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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81-5192

JEFFREY STUART DICKS,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tennessee Supreme Court's determination that Barbara Davis' testimony concerning her impressions of co-participant Strouth's statements were inadmissible presents a substantial federal constitutional question.

2. Whether the imposition of a sentence of death upon an active participant in a felony-murder is unconstitutional.

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OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 615 S.W.2d 126.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on February 2, 1981. Petitioner's petition to rehear was denied on May 4, 1981. Petitioner timely filed his Petition for Writ of Certiorari with this court.

STATEMENT OF THE CASE

Jeffrey Stuart Dicks was indicted for first degree murder by the Sullivan County Grand Jury on May 2, 1978. (R. [orders, pleadings, and minute entries] 4). The jury selection process began on February 6, 1979, and was completed on February 7, 1979. On February 7, 1979, the petitioner's trial began upon his plea of not guilty. (R. [orders, pleadings, and minute entries] 27-29).

During the guilt phase of the trial, petitioner proposed to call, as a witness, his co-defendant Donald Strouth who had been previously convicted for this offense and sentenced to death. Strouth, whose case was pending appeal, claimed his Fifth Amendment privilege against self-incrimination. (R. [transcript] 1206-1214). After Strouth claimed his Fifth Amendment privilege, petitioner proposed to recall Barbara Davis to the stand. Ms. Davis was examined outside the presence of the jury concerning certain statements made to her by Strouth (R. [transcript] 1212-1226). Her testimony indicates that in talking to Strouth she obtained the impression that Strouth was taking responsibility for the whole thing. (R. [transcript] 1221). Strouth did not say anything to her about the petitioner's participation in this matter. (R. [transcript] 1225-1226). The trial judge ruled that he would not allow her impressions

into evidence since they did not affect the petitioner's involvement in the crime. (R. [transcript] 1228). Certain statements given by Strouth to Agent Keesling were admitted for identification, Exhibits 17 and 18. (R. [transcript] 1230-1233). Petitioner did not contend that these statements by Strouth to the police officers should have been admitted as being against Strouth's penal interests. See (R. [transcript] 1229-1230).

After hearing the evidence and deliberating, the jury found petitioner guilty of murder in the first degree on February 9, 1979 (R. [orders, etc.] 35). On February 10, 1979, the jury heard the evidence presented regarding sentencing. Petitioner did not seek to introduce any evidence concerning Strouth's statements. After due deliberation, the jury sentenced petitioner to death. (R. [orders, etc.] 39). The jury unanimously found the following statutory aggravating circumstances: "The murder was especially heinous, atrocious or cruel in that it involved torture and depravity of mind;" (2) "the murder was committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing or placing of a destructive device or bomb." The jury unanimously found that "there are no mitigating circumstances sufficiently substantial to ourweigh the statutory aggravating circumstance or circumstances so listed above." (R. [transcript] 1442-1443).

Petitioner appealed to the Tennessee Supreme Court which affirmed the judgment.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this court or decide such a question in a way not in accord with the applicable decisions of this court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

THE DETERMINATION THAT BARBARA DAVIS' TESTIMONY OF HER IMPRESSIONS FROM STROUTH'S STATEMENTS WAS INADMISSIBLE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In Smith v. State, 587 S.W.2d 659 (Tenn. 1979), the Tennessee Supreme Court extended to criminal cases, its prior adoption of the declaration against penal interest as an exception to the hearsay rule. The court found, however, in this case, that that exception was not applicable since petitioner sought to have Ms. Davis testify concerning her impressions formed from conversations she had with Strouth. Ms. Davis' proposed testimony shows no statements against Strouth's penal interests relevant to petitioner's participation in this felony-murder. Strouth made no statements to Ms. Davis in which he took full responsibility for this offense. The extent of petitioner's participation in the offense was not a direct subject of conversation. Thus, Strouth's statements to her were not relevant since even the petitioner's evidence showed a degree of participation in the felony of armed robbery. Furthermore, any

statements made by Strouth which were exculpatory to petitioner, except one in which Strouth assumed full responsibility for all actions inside the Budget Shop, would not be against Strouth's penal interest and would not come within his hearsay exception. Thus, testimony by Ms. Davis does not show any reliable or relevant statement against penal interest such as that present in the exculpating evidence sought to be presented in Chambers v. Mississippi, 410 U.S. 284 (1973).

Additionally, Strouth had given previous statements, Exhibit 17, which clearly inculpated petitioner as a direct participant in this crime. Such statements would not be admissible under the rules of Bruton v. United States, 391 U.S. 123 (1968) or Douglas v. Alabama, 380 U.S. 415 (1965). Thus, were any statements made by Strouth to Ms. Davis admissible, the State would be constitutionally precluded from showing inconsistent statements by Strouth on the petitioner's role in this affair. As the trial judge aptly stated to defense counsel, "You're saying you want to eat blackberries but you want to do it without getting stain on your hands." (R. [transcript] 1224).

Petitioner did not seek to admit Ms. Davis' testimony at sentencing, probably because the restrictions of Bruton and Douglas might be lifted. Thus, Green v. Georgia, 442 U.S. 95 (1979) is totally inapplicable to these proceedings.

Under such circumstances, petitioner has not raised an issue which warrants the granting of the writ of certiorari.

II.

A DEATH SENTENCE MAY PROPERLY BE IMPOSED UPON PETITIONER WHOM THE EVIDENCE SHOWS TO BE AN ACTIVE PARTICIPANT IN THIS FELONY MURDER.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court specifically reserved the question of whether "the death penalty is constitutionally disproportionate for one who had not been proven to have taken life, to have attempted to take life, or to have intended to take life." Mr. Justice

White, dissenting in part and concurring in the judgment of the Court in Lockett has stated he would hold "that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death, . . ."

In Lockett v. Ohio, 438 U.S. 586 (1978), the factual circumstances show only that Lockett was outside in the car while the robbery, in which the unplanned homicide occurred, took place. In the instant case, the evidence presented to the jury at sentencing supports other inferences concerning the degree of petitioner's participation.

The jury in this case was instructed to consider as mitigating circumstances the factual theory presented by the defendant's testimony and the defendant's witness' testimony at trial and now being presented in this petition. (R. [transcript] 1436). The jury rejected petitioner's contention that he was merely waiting outside in the car while Strouth went inside the Budget Shop. Evidence supports such a rejection. The police officers found two sets of footprints leading from the side door of the Budget Shop. Ms. Casteel noticed both the petitioner and Strouth running from the entrance of the alleyway at 11:45 a.m. Mr. Keegan's death occurred shortly before noon. Two weapons were used in the assault. Such evidence supports a finding that petitioner participated in this homicide in which the throat of an unconscious man was calmly slit. The circumstances of Mr. Keegan's death would also support a finding of premeditation. Dicks, 615 S.W.2d at 130.

Under such factual circumstances, the decision of the Tennessee Supreme Court finding the jury could reasonably conclude the defendant was an active participant in this offense does not present a substantial federal question. The decision is also in accord with the decisions of other state courts of last resort which have addressed this issue. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980); Jacobs (Sonia) v. State, 396 So.2d 713 (Fla. 1981); Jacobs

(Eligaah) v. State, 396 So.2d 1113 (Fla. 1981). See Enmund v. State, 399 So.2d 1362 (Fla. 1981). The petitioner has not raised an issue which warrants the granting of the writ of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Senior Assistant Attorney General